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FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER LLP 901 NEW YORK AVENUE, NW WASHINGTON, DC 20001-4413			EXAMINER BORISSOV, IGOR N	
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1 UNITED STATES PATENT AND TRADEMARK OFFICE

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4 BEFORE THE BOARD OF PATENT APPEALS
5 AND INTERFERENCES
6

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8 *Ex parte* DANIELA GIACCHETTI
9

10 Appeal 2008-2866
11 Application 10/024,482
12 Technology Center 3600
13
14

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16 Decided: March 11, 2009
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18
19 Before HUBERT C. LORIN, LINDA E. HORNER, and ANTON W. FETTING,
20 *Administrative Patent Judges*.

21 FETTING, *Administrative Patent Judge*.

22 DECISION ON APPEAL

23 STATEMENT OF THE CASE

24 Daniela Giacchetti (Appellant) seeks review under 35 U.S.C. § 134 of a final
25 rejection of claims 1-21, the only claims pending in the application on appeal.

26 We have jurisdiction over the appeal pursuant to 35 U.S.C. § 6(b) (2002).

27
28 We AFFIRM-IN-PART.

1 The Appellant invented a simulation of the cosmetic counter experience,
2 allowing consumers to virtually apply beauty products on a facial image. This
3 permits consumers to shop from a wide variety of locations during hours when
4 traditional stores are closed. Also, virtual application of beauty products allow one
5 to test products and provide some indication of how certain beauty products might
6 impact an individual's future appearance. (Specification 2:¶ 005).

7 An understanding of the invention can be derived from a reading of exemplary
8 claim 1, which is reproduced below [bracketed matter and some paragraphing
9 added].

10 1. A method of enabling display of a simulated facial image, the
11 method comprising:

12 [1] facilitating display,

13 on a display device,

14 of a plurality of templates,

15 wherein at least some of the templates are representative of a
16 portion of a face having a simulation of use of a beauty product;

17 [2] enabling selection of at least one of the displayed templates; and

18 [3] facilitating display,

19 on the display device,

20 of a simulated facial image

21 including at least one displayed facial portion having a
22 simulation of use of a beauty product,

23 wherein the displayed facial portion having a simulation of the
24 simulated facial image

25 corresponds to a facial portion of the at least one selected
26 template, and

27 wherein the simulation of the displayed facial portion

28 corresponds to a simulation of the at least one selected
29 template.

This appeal arises from the Examiner's Final Rejection, mailed December 14, 2006. The Appellant filed an Appeal Brief in support of the appeal on May 10, 2007. An Examiner's Answer to the Appeal Brief was mailed on August 24, 2007. A Reply Brief was filed on October 23, 2007. Oral argument was presented at a hearing on February 10, 2009.

PRIOR ART

The Examiner relies upon the following prior art:

Lambertsen	US 2002/0024528 A1	Feb. 28, 2002
Orpaz	US 6,937,755 B2	Aug. 30, 2005

REJECTIONS

Claims 1-15 and 18-21 stand rejected under 35 U.S.C. § 101 as directed to non-statutory subject matter.

Claims 1-11 and 13-21 stand rejected under 35 U.S.C. § 102(e) as anticipated by Orpaz.

Claim 12 stands rejected under 35 U.S.C. § 103(a) as unpatentable over Orpaz and Lambertsen.

ISSUES

The issues pertinent to this appeal are

- Whether the Appellant has sustained its burden of showing that the Examiner erred in rejecting claims 1-15 and 18-21 under 35 U.S.C. § 101 as directed to non-statutory subject matter.

○ This issue turns on whether facilitating a display and enabling a selection actually require performance of activities in a statutory process.

- Whether the Appellant has sustained its burden of showing that the Examiner erred in rejecting claims 1-11 and 13-21 under 35 U.S.C. § 102(e) as anticipated by Orpaz.
- Whether the Appellant has sustained its burden of showing that the Examiner erred in rejecting claim 12 under 35 U.S.C. § 103(a) as unpatentable over Orpaz and Lambertsen.

The pertinent issues for the art rejections turn on whether Orpaz describes the templates and simulation claimed.

FACTS PERTINENT TO THE ISSUES

The following enumerated Findings of Fact (FF) are believed to be supported by a preponderance of the evidence.

Facts Related to Claim Construction

01. The disclosure contains no lexicographic definition of “representation.”
02. The ordinary and customary meaning of “representation” is something that represents.¹ Among the definitions of “represent” are to depict in art or portray, and to describe or present in words.
03. The disclosure contains no lexicographic definition of “simulated.”

¹ *American Heritage Dictionary of the English Language* (4th ed. 2000).

- 1 04. The ordinary and customary meaning of “simulated” is made in
2 resemblance of or as a substitute for another.¹
- 3 05. The term "template" refers to a representation, such as an image, that
4 is reflective of subject matter that may be incorporated into a facial
5 image. At least some of the templates are representative of a portion of a
6 face having a simulation of use of a beauty product (Specification 4:¶
7 009).
- 8 06. Enabling the image to be displayed may be accomplished in one or
9 more of a variety of direct and indirect ways, including directly
10 displaying the image on a display device, providing access to software
11 that facilitates display, providing network access which enables display
12 of the image on a user-controlled device, providing a dedicated use
13 device, or cooperating with an entity who either directly displays the
14 image or who helps the user to display the image. (Specification 12:¶
15 049). As with the definition of "enabling display" above, the term
16 "applying" and "selecting" are also to be interpreted as including direct
17 and indirect actions, such as, for example, providing access to software,
18 providing access to a network site, cooperating with a third party who
19 aids a user, or by participating in any way in activities that aid a user in
20 applying and selecting (Specification 12-13:¶ 050).
- 21 07. The limitation of "facilitating" could involve either direct or indirect
22 activity. For example, the phrase "facilitating construction" may include
23 providing access to software for constructing the three-dimensional
24 image based on at least one captured image of the subject (Specification
25 27: ¶ 093).

Orpaz

08. Orpaz is directed to make-up and accessory products that precisely overlie and smoothly blend with a digital image of a consumer (e.g., an image of the consumer's face, or head and torso) to create a true-to-life simulation of how such products will appear on the consumer. This allows the consumer to choose from a large plurality of products, to create a multiplicity of combinations of image simulations, as desired by the consumer and to modify the image to simulate applications of various amounts of make-up products (Orpaz 1:42-50).
09. Orpaz describes its user interface as being an image simulation graphic interface (ISI) that provides a single interface through which users can "try and buy" cosmetic make-up products and fashion accessories, and other related products. The ISI includes the user's base image, a category list, and a subcategory list (Orpaz 3:27-33; Fig. 3). A user may choose a category and subcategory from the respective lists.
10. The categories in Orpaz's category list can include eyes, lips & face, accessories, nails, hair, and other categories of related items. The subcategory list is dependent upon the category chosen (i.e., highlighted or clicked upon). As shown in Orpaz Fig. 3, if the lips & face category is chosen, the subcategory list can include: lipstick, lip-gloss, lip pencil, blush, foundation, power, and others. Subcategories for the eyes category can include: eye shadow, eyeliner, mascara, eye pencil, etc. (Orpaz 3: 34-40).
11. Orpaz's base image of the consumer is preferably an image of the consumer without any make-up (or with only base make-up); thereby

forming the "blank canvas" upon which make-up products will be applied, with the digital blending technologies of the invention. Orpaz's FIGS. 7-10 display how the base image is altered by the system when make-up products are applied to various portions of a base image (Orpaz 3:66 – 4:11).

12. For each base image, one or more make-up application areas are defined for each make-up product type and are assigned a separate alpha channel within the base image file. Each alpha channel is a pixel-by-pixel map representing where and how much of an associated make-up product should be placed within the base image. Preferably, the alpha values in the alpha channels range in scale from an upper limit to a lower limit. An alpha value equal to the lower limit indicates that the color of the associated make-up product should be applied to the associated pixel in the base image, without modification (i.e., without blending). An alpha value equal to the upper limit indicates that the color of the associated make-up product should not be applied to the associated pixel in the base image. The make-up application areas have blending regions wherein the alpha values range between the upper and lower limits indicating that the color of the associated make-up product should be blended, according to the alpha value, with the color of the associated pixel of the base image (Orpaz 5:66 – 6:19).

13. Orpaz's user selects a product using the image simulation interface (ISI). To simulate the appearance of the selected product on the base image of the user, the color information of the selected product is modified and blended according to the color information of the base image, to create a composite image. The appearance information of the

associated make-up application area is modified, simulating the physical process of color application, to create the appearance that the make up region has been fully covered with the color of the product, and was photographed at the same illumination and shading as the base image (Orpaz 6:61 – 7:13).

14. Orpaz's user can adjust the amount of make-up applied by the system to the base image. The ISI includes application controls to increase or decrease the amount of make-up applied to the base image. These controls effectively adjust the offset to the alpha values of the pixels of the blending region to affect the respective weights given to the colors of the pixels of the original base image and of the pixels of the blending region of the modified make-up application area (Orpaz 9:8-16).

Lambertsen

15. Lambertsen is directed to a virtual makeover system which allows users to apply beauty products to a personal photographic image, creating a digitally enhanced image (Lambertsen 1:¶ 0007).

16. Lambertsen describes how the user selects various features in a photograph and outlines these features. During the outlining step, the user defines the size and shape of a specific feature for which future treatment or manipulation is desired. The user outlines the feature by selecting and moving the one or more points to alter the orientation of connected lines, thus creating a new shape. The selected features can include, for example, the face shape, which includes the forehead, left side, and right side of the face, the eyes, lips, eye creases, eyebrows, eye

highlights, cheeks, and irises. Other features can include the head, eyeliners, eyelids, and eyelashes (Lambertsen 1:¶'s 0010-11).

Facts Related To The Level Of Skill In The Art

17. Neither the Examiner nor the Appellant has addressed the level of ordinary skill in the pertinent arts of systems analysis and programming, virtual reality, virtual cosmetology, graphic interface design, graphic simulation, and facial modeling. We will therefore consider the cited prior art as representative of the level of ordinary skill in the art. *See Okajima v. Bourdeau*, 261 F.3d 1350, 1355 (Fed. Cir. 2001) (“[T]he absence of specific findings on the level of skill in the art does not give rise to reversible error ‘where the prior art itself reflects an appropriate level and a need for testimony is not shown’”) (quoting *Litton Indus. Prods., Inc. v. Solid State Sys. Corp.*, 755 F.2d 158, 163 (Fed. Cir. 1985)).

Facts Related To Secondary Considerations

18. There is no evidence on record of secondary considerations of non-obviousness for our consideration.

PRINCIPLES OF LAW

Claim Construction

During examination of a patent application, pending claims are given their broadest reasonable construction consistent with the specification. *In re Prater*, 415 F.2d 1393, 1404-05 (CCPA 1969); *In re Am. Acad. of Sci. Tech Ctr.*, 367 F.3d 1359, 1369 (Fed. Cir. 2004).

Limitations appearing in the specification but not recited in the claim are not read into the claim. *E-Pass Techs., Inc. v. 3Com Corp.*, 343 F.3d 1364, 1369 (Fed.

Cir. 2003) (claims must be interpreted “in view of the specification” without importing limitations from the specification into the claims unnecessarily).

Although a patent applicant is entitled to be his or her own lexicographer of patent claim terms, in *ex parte* prosecution it must be within limits. *In re Corr*, 347 F.2d 578, 580 (CCPA 1965). The applicant must do so by placing such definitions in the specification with sufficient clarity to provide a person of ordinary skill in the art with clear and precise notice of the meaning that is to be construed. *See also In re Paulsen*, 30 F.3d 1475, 1480 (Fed. Cir. 1994) (although an inventor is free to define the specific terms used to describe the invention, this must be done with reasonable clarity, deliberateness, and precision; where an inventor chooses to give terms uncommon meanings, the inventor must set out any uncommon definition in some manner within the patent disclosure so as to give one of ordinary skill in the art notice of the change).

Statutory Subject Matter

[Whether a] patent is invalid for failure to claim statutory subject matter under § 101, is a matter of both claim construction and statutory construction.

State St. Bank & Trust Co. v. Signature Fin. Group, 149 F.3d 1368, 1370 (Fed. Cir. 1998).

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

35 U.S.C. § 101.

[T]he Court has held that a claim is not a patent-eligible “process” if it claims “laws of nature, natural phenomena, [or] abstract ideas.” *Diamond v. Diehr*, 450 U.S. 175, 185 (1981) (citing *Flook*, 437 U.S. at 589, and *Gottschalk v. Benson*, 409 U.S. 63, 67 (1972)). Such

fundamental principles [as "laws of nature, natural phenomena, and abstract ideas"] are "part of the storehouse of knowledge of all men . . . free to all men and reserved exclusively to none." *Funk Bros. Seed Co. v. Kalo Inoculant Co.*, 333 U.S. 127, 130 (1948); see also *Le Roy v. Tatham*, 55 U.S. (14 How.) 156, 175 (1852) ("A principle, in the abstract, is a fundamental truth; an original cause; a motive; these cannot be patented, as no one can claim in either of them an exclusive right."). "Phenomena of nature, though just discovered, mental processes, and abstract intellectual concepts are not patentable, as they are the basic tools of scientific and technological work." *Benson*, 409 U.S. at 67.

In re Bilski, 545 F.3d 943, 952 (Fed. Cir. 2008) (footnote omitted).

The Court in *Diehr* thus drew a distinction between those claims that "seek to pre-empt the use of" a fundamental principle, on the one hand, and claims that seek only to foreclose others from using a particular "application" of that fundamental principle, on the other. 450 U.S. at 187, 101 S.Ct. 1048. Patents, by definition, grant the power to exclude others from practicing that which the patent claims. *Diehr* can be understood to suggest that whether a claim is drawn only to a fundamental principle is essentially an inquiry into the scope of that exclusion; i.e., whether the effect of allowing the claim would be to allow the patentee to pre-empt substantially all uses of that fundamental principle. If so, the claim is not drawn to patent-eligible subject matter.

Id., 545 F.3d at 953.

The Supreme Court . . . has enunciated a definitive test to determine whether a process claim is tailored narrowly enough to encompass only a particular application of a fundamental principle rather than to pre-empt the principle itself. A claimed process is surely patent-eligible under § 101 if: (1) it is tied to a particular machine or apparatus, or (2) it transforms a particular article into a different state or thing. See *Benson*, 409 U.S. at 70 ("Transformation and reduction of an article 'to a different state or thing' is the clue to the patentability of a process claim that does not include particular machines."); *Diehr*, 450 U.S. at 192 (holding that use of mathematical formula in process "transforming or reducing an article to a different state or thing"

constitutes patent-eligible subject matter); see also *Flook*, 437 U.S. at 589 n.9 ("An argument can be made [that the Supreme] Court has only recognized a process as within the statutory definition when it either was tied to a particular apparatus or operated to change materials to a 'different state or thing'"); *Cochrane v. Deener*, 94 U.S. 780, 788 (1876) ("A process is . . . an act, or a series of acts, performed upon the subject-matter to be transformed and reduced to a different state or thing.").

Id., 545 F.3d at 954 (footnote omitted).

The machine-or-transformation test is a two-branched inquiry; an applicant may show that a process claim satisfies § 101 either by showing that his claim is tied to a particular machine, or by showing that his claim transforms an article. See *Benson*, 409 U.S. at 70. Certain considerations are applicable to analysis under either branch. First, as illustrated by *Benson* and discussed below, the use of a specific machine or transformation of an article must impose meaningful limits on the claim's scope to impart patent-eligibility. See *Benson*, 409 U.S. at 71-72. Second, the involvement of the machine or transformation in the claimed process must not merely be insignificant extra-solution activity. See *Flook*, 437 U.S. at 590.

Id., 545 F.3d at 961-62.

Anticipation

"A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631 (Fed. Cir. 1987). "When a claim covers several structures or compositions, either generically or as alternatives, the claim is deemed anticipated if any of the structures or compositions within the scope of the claim is known in the prior art." *Brown v. 3M*, 265 F.3d 1349, 1351 (Fed. Cir. 2001). "The identical invention must be shown in as complete detail as is contained in the ... claim." *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1236 (Fed. Cir. 1989). The elements must be arranged

as required by the claim, but this is not an *ipsissimis verbis* test, i.e., identity of terminology is not required. *In re Bond*, 910 F.2d 831, 832 (Fed. Cir. 1990).

Obviousness

A claimed invention is unpatentable if the differences between it and the prior art are “such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art.” 35 U.S.C. § 103(a) (2000); *KSR Int’l Co. v. Teleflex Inc.*, 127 S.Ct. 1727, 1729-30 (2007); *Graham v. John Deere Co.*, 383 U.S. 1, 13-14 (1966).

In *Graham*, the Court held that that the obviousness analysis is bottomed on several basic factual inquiries: “[(1)] the scope and content of the prior art are to be determined; [(2)] differences between the prior art and the claims at issue are to be ascertained; and [(3)] the level of ordinary skill in the pertinent art resolved.” 383 U.S. at 17. *See also KSR*, 127 S.Ct. at 1734. “The combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results.” *Id.* at 1739.

“When a work is available in one field of endeavor, design incentives and other market forces can prompt variations of it, either in the same field or a different one. If a person of ordinary skill can implement a predictable variation, § 103 likely bars its patentability.” *Id.* at 1740.

“For the same reason, if a technique has been used to improve one device, and a person of ordinary skill in the art would recognize that it would improve similar devices in the same way, using the technique is obvious unless its actual application is beyond his or her skill.” *Id.*

1 “Under the correct analysis, any need or problem known in the field of
2 endeavor at the time of invention and addressed by the patent can provide a reason
3 for combining the elements in the manner claimed.” *Id.* at 1742.

4 ANALYSIS

5 *Claims 1-15 and 18-21 rejected under 35 U.S.C. § 101 as directed to non-*
6 *statutory subject matter.*

7 The Appellant argues that the rejection of claim 1 should be reversed, and
8 makes no reference to the remaining claims within the scope of this rejection
9 (Appeal Br. 10-12; Reply Br. 2-5). We understand from this that the Appellant
10 argues claims 1-15 and 18-21 as a group. Accordingly, we select claim 1 as
11 representative of the group. 37 C.F.R. § 41.37(c)(1)(vii) (2007).

12 The Examiner found that the Specification defines "facilitating" and "enabling"
13 as involving either direct or indirect activity. Based on these definitions, the
14 Examiner found that the method steps of facilitating display and enabling selection
15 do not require the actual display or selection step to be performed, and can be
16 understood as merely having an idea about how to arrange the selection of the
17 information. Since the method claim 1 does not require any machine or apparatus
18 to perform the recited steps, the Examiner concluded that claim 1 falls outside the
19 scope of § 101 as failing to produce a useful and concrete and tangible result.

20 The Appellant contends that the Examiner misconstrues the terms "facilitating"
21 and "enabling," in claim 1. The Appellant contends that the definitions include
22 direct activities that are exemplified in the Specification, and such direct activities
23 form a statutory process (Reply Br. 2-4).

1 We disagree with the Appellant. During examination of a patent application,
2 pending claims are given their broadest reasonable construction consistent with the
3 specification. *In re Prater*, 415 F.2d 1393, 1404-05 (CCPA 1969). In this case,
4 the Appellant has explicitly defined the limitations of enabling and facilitating in
5 the three steps of claim 1 to include indirect activity such as providing access to
6 software, providing access to a network site, cooperating with a third party who
7 aids a user, or by participating in any way in activities that aid a user in what is
8 enabled or facilitated (FF 06 & 07). Thus, each of the steps in claim 1 may be
9 construed to be providing access to software or aiding a user. While the software
10 or user might then go on to actually perform what is facilitated or enabled, the
11 broadest reasonable construction would not necessarily include that performance
12 within the scope of the three steps in claim 1.

13 With this construction in mind, we apply the machine-or-transformation test, as
14 described in *Bilski*, 545 F.3d at 961-62, to determine whether the subject matter of
15 process claims 1-15 and 18-21 are patent-eligible under 35 U.S.C. § 101.

16 These process claims recite a series of process steps that are not necessarily
17 tied in any manner to a machine, because the scope of the steps also reach
18 activities that do no more than provide some access or aid. In other words, these
19 claims do not limit the process steps to any specific machine or apparatus. Thus,
20 the claims fail the first branch of the machine-or-transformation test because they
21 are not tied to a particular machine or apparatus. The steps of these process claims
22 also fail the second branch of the machine-or-transformation test because nothing
23 must be transformed, not even data, when the steps are construed as encompassing
24 no more than providing access or aiding. Thus, the process of claim 1 fails the
25 machine-or-transformation test and is not patent-eligible under 35 U.S.C. § 101.

1 The Appellant has not sustained its burden of showing that the Examiner erred
2 in rejecting claims 1-15 and 18-21 rejected under 35 U.S.C. § 101 as directed to
3 non-statutory subject matter.

4 *Claims 1-11 and 13-21 rejected under 35 U.S.C. § 102(e) as anticipated by Orpaz.*

5 Claims 1 and 18 are the independent method claims. The Examiner found that
6 Orpaz anticipated claim 1. The Examiner found that the facial image and the
7 category list elements (Orpaz: Fig. 3) were templates from among which a
8 customer selected and Orpaz simulated a beauty product upon a facial image at the
9 place represented by the selected category (Answer 8).

10 The Appellant contends that if the representations of facial portions shown in
11 Orpaz Fig. 3 are the templates as found by the Examiner, then the simulation of the
12 displayed facial portion has no corresponding simulation of the selected template
13 (Reply Br. 6-8).

14 We agree with the Appellant. The Examiner appears to use inconsistent
15 findings as to what constitutes the templates. At Answer 13, where the Examiner
16 explains how Orpaz describes claim 1, the Examiner first finds that the category
17 list is the set of templates and later finds that the make up application areas on the
18 central picture are the templates. Apparently this is because it is the category list
19 that is selected from and it is the make up application area that simulates the beauty
20 product.

21 Claim 1 clearly requires that the template selected be the one in the simulation,
22 however. The Examiner has not presented any findings in which this simultaneity
23 occurs. We conclude the Examiner has erred in finding that Orpaz anticipates
24 claim 1. Independent claim 18 has limitations similar to claim 1 and the Examiner
25 similarly erred in its rejection.

The Appellant has sustained its burden of showing that the Examiner erred in rejecting claims 1-11 and 13-21 under 35 U.S.C. § 102(e) as anticipated by Orpaz.

Claim 12 rejected under 35 U.S.C. § 103(a) as unpatentable over Orpaz and Lambertsen.

Claim 12 further requires enabling selection of at least one of a size and a shape for at least one of a head, eyes, nose, lips, ears, and eye brows. The Examiner found that Lambertsen described this limitation (Answer 11). The Appellant argues that the Examiner erred as to rejecting the parent claim 1 and further that Lambertsen only describes outlines being changed, not body parts sizes and shapes (Appeal Br. 16-17). We agree that the Examiner erred as to rejecting parent claim 1 and that Lambertsen does not describe the missing limitations from claim 1.

The Appellant has accordingly sustained its burden of showing that the Examiner erred in rejecting claim 12 under 35 U.S.C. § 103(a) as unpatentable over Orpaz and Lambertsen.

CONCLUSIONS OF LAW

The Appellant has not sustained its burden of showing that the Examiner erred in rejecting claims 1-15 and 18-21 under 35 U.S.C. § 101 as directed to non-statutory subject matter.

The Appellant has sustained its burden of showing that the Examiner erred in rejecting claims 1-11 and 13-21 under 35 U.S.C. § 102(e) as anticipated by Orpaz.

The Appellant has sustained its burden of showing that the Examiner erred in rejecting claim 12 under 35 U.S.C. § 103(a) as unpatentable over Orpaz and Lambertsen.

DECISION

To summarize, our decision is as follows:

- The rejection of claims 1-15 and 18-21 rejected under 35 U.S.C. § 101 as directed to non-statutory subject matter is sustained.
- The rejection of claims 1-11 and 13-21 under 35 U.S.C. § 102(e) as anticipated by Orpaz is not sustained.
- The rejection of claim 12 under 35 U.S.C. § 103(a) as unpatentable over Orpaz and Lambertsen is not sustained.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED-IN-PART

JRG

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